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FROM THE STUDENT BAR ASSOCIATION

Reflections And Recommendations On The Teaching Of Professional Responsibility

by Judy Goldenberg

*I hear, and I forget;
I see, and I remember;
I do, and I understand.*

Old Chinese Proverb

Current methods for instilling professionalism in law students leave something to be desired in the judgment of nearly all observers. To date, no techniques have achieved substantial success in raising the level of awareness or increasing the ability of students and attorneys to resolve ethical dilemmas arising in the multifaceted practice of law. One study by Columbia University's Wanger Thielens concluded through empirical data measuring changes in ethical responses of students from four law schools in the Class of 1964, that each class at each school would have a net addition of only thirteen more members out of each 200 graduates adhering to each value than they had at entrance.

Legal education is graduate study: students are adults. One view is that ethical training at this point in a person's life is too late. Proponents of this view believe that moral character is malleable only at an early age and that the value systems which underpin ethical judgments (or explain the lack of them) are so deep-seated in adults as to be immutable. . . people have it, or they do not. Restructuring adult personalities, if not impossible, would be so costly as to be at least impractical. Professors adopting this view can and do justifiably argue that a course at the law school level in ethics is absolutely superfluous since students' attitudes will be nearly impossible to change. In fact, some have suggested that the only useful role the law school can play in this area is to develop an efficient screening tech-

nique for determining students' character qualifications prior to their admission to the law program.

A second view is that behavior in ethically charged situations is more likely to be a response to pressures in the environment than an expression of an individual's values and ethical judgment. (Stanley Milgram and Philip Zimbardo, psychologists, have created experimental clinical settings to study the effects of conflicts arising between 'ethical' people and stressful environments. Their conclusions: Many people, perhaps the majority, can be made to do almost anything when put into psychologically compelling situations — regardless of their morals, ethics, values, beliefs, or personal convictions.) Therefore, to those who adopt this perspective, the relevant questions are not: How much knowledge of the rules does a person have? What values does a person hold? Where did they come from? Can they be changed? Rather, the relevant question is: What are the environmental stresses that cause people to act ethically or unethically? Again, professors adopting this view argue that ethical instruction would have little effect upon law students who, when later, as professionals, are faced with daily potentially stressful situations, would act in a manner completely disdainful of the lessons in morality they had so diligently 'learned'.

Two other psychologists, Jean Piaget and Lawrence Kohlberg, have conducted research the results of which suggest that ethical judgment is a function of individual moral growth, with each level transcending the preceding stages and providing a new way of thinking about the world and the place of the person in it. Childhood is recognized as an important

state in learning, but it does not, as may be popularly believed, cast the die for all time. Kohlberg has labeled moral judgment as having three general levels: preconventional, conventional, and postconventional. Typically adults develop only to the modes of reasoning characterized as conventional — pleasing others and rule obedience. Only persons in the stage of post-conventional reasoning would be likely to resist situational pressures leading to unethical actions.

The view arising from this theory is that moral reasoning is learned, but not through standard law school techniques of lectures, memorization and Socratic dialogue. Rather, for students/lawyers to achieve postconventional heights of reasoning, they must *actively* participate in group processes involving ethical questions and personally engage in the resolution of role conflicts. Numerous professors expounding this belief have argued that clinical legal education exemplifies such a mode, and all agree that traditional classroom methods fail to accomplish this desired objective. They would support Piaget's contention that learning, indeed the development of intelligence itself, is a continuous process of assimilating the external facts of experience and integrating them into the individual's internal mental structures. The activity is crucial: the child, or for that matter the adult, must discover understanding for himself. This last view stands alone in holding out a positive message: teachers of professional responsibility courses *can* inculcate their students with those values and skills necessary to function as 'complete' lawyers and human beings.

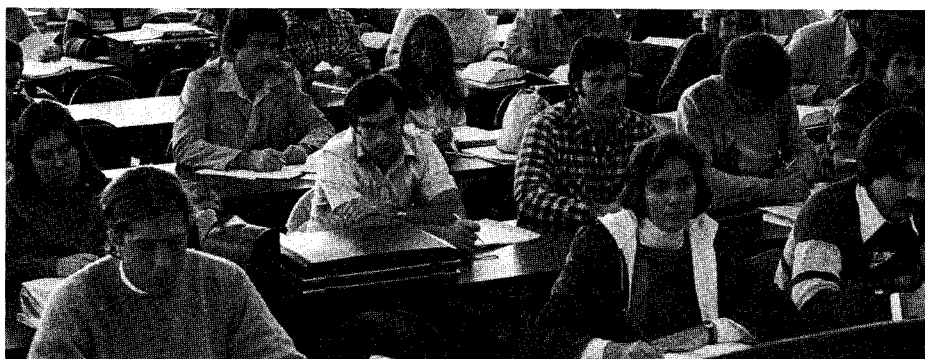
As Savoy noted in his 1974 Yale Law Journal article, *Toward A New*

Politics of Legal Education, "There is not a single lawyer I know with whom I went to law school who feels that his legal education adequately prepared him for the practice of law (or anything else for that matter). My experience in one of the larger post-graduate educational institutions in America — the New York District Attorney's Office — was sobering. Trying to reconstruct an incident from interviews with witnesses; awakening to the ritualistic performance of police officers on the witness stand; plumbing the subtleties of the plea-bargaining process; learning the nuances of communication between judges and attorneys, I became suddenly aware of the unforgiveable irrelevance of my legal education to what was happening in my head, in the courtroom, and in the streets of our cities. The first case I tried was a numbing experience. My only consolation was that the Legal Aid Lawyer who represented the defendant was as woefully untutored as I."

We can safely presume that law school administrators are aware, to at least some degree, that this problem of law school graduates' inability to 'handle' the law exists. Why then don't they assure that their students are taught how to function in a lawyerly manner? Various analysts have suggested that the answer lies with the composition of the law school faculty itself.

One possibility is that many professors do not know personally what it is that lawyers do, and how they do it since they were chosen to teach in large part on the basis of academic credentials, not experience. The transition from student to teacher is sometimes made directly, with no time in between to get practical know how 'downtown'. (In fact, in some cases there are professors teaching because the idea of practicing is somehow frightening or distasteful to them.) Those who have had practical experience will ordinarily have served in very large firms with high status (courtesy of their former position as members of a law review editorial board), far removed from the kind of practice which will realistically occupy

most law school graduates. Such instructors cannot be expected to teach someone else how to 'lawyer', if they have never done so themselves. Another possibility is that law professors play an old game called "that's out of my field". They contend that the way lawyers conduct their practices, what they say and do with clients, judges and clerks, is a combination of common sense, instinct, psychology, intuition, and experience that no law school can hope to teach. Such an argument can be a 'copout' for not providing a necessary practical dimension to the curriculum. The fact that some components of professional 'savvy' are not teachable is no excuse for not teaching those which are. It has also been suggested that the background of law faculty members—



intellectually elite scholars—makes them feel more comfortable with current students who are in the same category. That is, they tend to address themselves and the content of their courses to those who 'speak their language'. Unfortunately, when professors direct their teaching toward the upper ten percent of the class, such a technique may be termed professionally irresponsible, since the other ninety percent will receive dubious future benefit from their law school studies. To avoid such a pitfall, Dean McKay of New York University has proposed that there be instituted a series of guidelines for the conduct of lawyers primarily acting as law teachers. He has appropriately labeled them "Canons of Ethics for Law Teachers", and styled them after the Code of Professional Responsibility. In fact, Cannon Three of his doctrine reads: "A law teacher should promote

the cause of academic freedom in behalf of colleagues and students alike." Surely, this means that the law faculty, regardless of academic background, past practical experience and/or present extracurricular activities, be made to live up to their position and accept responsibility for preparing a greater percentage of the law student body analytically and practically—in knowledge of the law and what to do with it—for their imminent entry into the law arena.

Despite the widespread course work, now of several years duration, the optimum method of instruction in legal ethics and professional responsibility has not as yet been settled and agreed upon. For example, there is still debate whether the course should be introduced in the first year of law

school since, by the time the student reaches his second or third year, his thoughts as to the legal profession have probably begun to crystalize. In addition, the upper level student is often more concerned with other law courses because the professional responsibility class is worth fewer credit hours and impliedly requires less preparation while the first year student is not so cynical and is generally more inclined to enter into discussions due to the psychological need for feedback.

On the other hand, as the late Professor Currie has written, "training for professional responsibility and for awareness of the role of law in society is not a matter that can be parcelled out and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time." The factor determining the success of this approach is the willingness of the law school faculty, in

toto, to adopt it. It is unlikely that professors who, for one valid reason or another, do not support the idea will provide pervasive teaching experiences for their students. Unless an administrative watchdog policy is strictly enforced, the program will fail for inconsistency.

Of greater import than the question of when the course should be offered, are the issues surrounding the actual content or scope of the subject to be taught. Judge Joiner of Michigan has stated that law schools lack lawyer models for their students. His thesis is that practitioners and/or judges should be utilized as adjunct faculty members to augment current courses which he believes are not explaining, defining or teaching what lawyers should do. Needed, at minimum, is a three credit-hour course that provides the 'stuff' of law practice within the context of the presently mandatory Canons of Professional Responsibility—fee schedules, advertising, setting up a solo practice, et. al.—and beyond the realm of the Code—interviewing, handling, and counseling clients, drafting techniques, practice in filing papers, familiarity with local standardized court and clerk procedures, etc. Simulation exercises and analysis of problems provide a starting point, but there is much more to be done. As the University of Maryland Law School's Dean Kelly indicates in *Legal Ethics and Legal Education*, "the legal ethics course will always be viewed as a problem child in the curriculum as a 'Mickey Mouse' subject to students, until it engages the challenges in practice of the complex interactions of law, practical judgment and moral sentiment."

UofB

Solidarity Day: Where Were The Lawyers?

by Stanley Janor

Graduate lawyers, by personal inclination and/or training, are usually fairly humanistic and generalistic in their thinking. Unfortunately, a large percentage of them eventually sell out for the big bucks gained by the dehumanizing process of specialization, generally in some field which often runs counter to, rather than with, the public's interests. Do we not owe them, the same public whose money and faith supports our government and legal system, something more? We are uniquely suited, blessed even, by our legal education to seek solutions to widely diverse problems. In such a complex society, and with a supposed "government of laws, not of men", who should be better able to govern than lawyers? Yet, it is hard to remember an administration so thoroughly dominated by one-minded technocrats and close-minded ideologues with nary a lawyer in sight—except for Reagan's former personal tax-shelter consultant, Attorney (and I use the term loosely) General William French Smith. Where are the lawyers? Many of them, no doubt, are laying back and licking their chops in anticipation of higher retainers from the corporations and wealthy individuals who will be like pigs in a sewage plant under the new tax laws. Those with any social consciousness have been neatly hamstrung by the totality of the change wrought by this weak-willed Congress. There is virtually nothing left to save and little which could be changed through litigation. What, then, can be done? Privately, lawyers must alter their view of themselves from profiteers to servants of the public and its legal system. Publicly, lawyers must reassert their traditions of integrity, humanism, and generalism so that the majority of people might once again accept their leadership. The present situation of the so-called experts being "on top" rather than "on tap" as they should be is socially and politically

intolerable. Lawyers must step forward to help cure the ills of the nation that they were so instrumental in founding and shaping, or watch the once magnificent body they created slowly die around them.

Even to a person inclined by disposition and profession to view most events dispassionately and analytically, the sight of a quarter-million people on the Capitol Mall was emotionally stirring. The composition of the crowd was even more heartening. It wasn't just kids, living off Mommy and Daddy's money, blowing off steam and skipping classes. It wasn't just the poor, purportedly living off taxpayers' money, asking for even more. The crowd *was* Mommy and Daddy, definitely taxpayers—as one writer so aptly put it "Mr. and Mrs. America crying ouch!" When such people, who probably never protested anything in their lives (who, in fact, probably denounced those who did) march in the streets of Washington, the political and social significance is inestimable and cannot be ignored.

Equally significant, and disappointingly so, was the absence of any banners saying "State Bar Association" or even "Attorneys Against Voo Doo Economics." The reasons for this void run the gamut from the general overall affluence of lawyers, many being members of the monied conservative establishment that Reaganomics will benefit most, to the undeniable truism that lawyers are always needed to work with the law, no matter how unjust it might be. Such reasons, however, are as simplistic, selfish, and narrow-minded as the current administration and the policies which it is inflicting on the American Citizen.

Lawyers suffered perhaps their worst image-damaging era ever under Tricky Dicky and his California Mafia, most of whom, sad to say, were law school graduates. Collectively, they stamped the term "scheister" so indel-